86-508

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

SUPREME COURT OF THE

UNITED STATES

A P P E N D I X

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON WRIT OF CERTIORARI TO THE

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

Daniel Martin, Esq

356-12 Gemini Dr

So Somerville, NJ

10 APP

ORIGINAL FILED TRENTON
Duplicate hereof filed with
the Somerset County Clerk
on 9/11/80
MICHAEL R.IMBRIANI

SACHAR,BERNSTEIN,ROTHBERG,SIKORA&MONGELLO
A Professional Corporation
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700 Park Avenue
Plainfield, New Jersey 07061
(201)757-8800
Attorneys for plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, SOMERSET COUNTY
DOCKET NO. M-8660-79

MAXINE L. MASTROPIETRO,
plaintiff,
-vs-
ROBERT A. MASTROPIETRO,
defendant

CIVIL ACTION
DUAL FINAL
JUDGMENT
OF DIVORCE

This matter coming on for hearing on August 19, 1980, the Honorable Michael R. Imbriani, J.S.C., presiding, in the presence of Libby E. Sachar, Esq.,of Sachar, Pernstein, Rothberg, Sikora & Mongello, Esqs., Attorneys for Plaintiff, and Leroy P. Lusardi, Esq., Attorney for Defendant, and upon both plaintiff and

defendant having withdrawn their answers to complaint and counterclaim, and the Court having heard and considered the proofs in this action and the argument of counsel, and it appearing that the plaintiff and defendant were joined in the bond of matrimony on August 4, 1973, and the plaintiff and defendant having pleaded and proved a cause of action for divorce under the statute in such case made and provided, and the plaintiff and defendant having been bona fide residents of the State of New Jersey for more than one year next preceeding the commencement of this action and jurisdiction having been acquired over the defendant pursuant to the rules governing the courts:

It is on this 11th day of September, 1980, ORDERED AND ADJUDGED by virtue of the power and authority of this Court and the acts of the legislature in such case made and provided, and the said Court

does hereby ORDER AND ADJUDGE that the plaintiff, Maxine L. Mastropietro, and the defendant, Robert Alan Mastropietro, be divorced from the bond of matrimony for the cause aforesaid and that the said parties, and each of them, be freed and discharge from the obligations thereof, and that the marriage between the parties is hereby dissolved, and it appearing that the parties hereunto have stipulated for the record a property settlement agreement providing for the disposition of all collateral issues usually attendant upon matrimonial litigation, which the parties are ordered to carry out, and which said agreement is as follows:

1. The defendant shall have the custody of Brian Mastropietro, born February 17,1975, Michael Mastropietro, born May 24, 1976, and Jeffrey Mastropietro, born May 9, 1978, until further of the Court.

2. The plaintiff shall have unlimited right of visitation with the said infant children on giving the defendant 48 hours notice of her intention to exercise said visitation, which visitation shall include vacation periods and overnight visits.

3. Defendant shall be responsible for all of the support and maintenance of the said infant children, including but not limited to their medical, dental, drug, and education expenses. The defendant shall not be responsible for any expenses for the said children. There shall be no alimony provided for plaintiff.

4. Plaintiff and defendant are the owners of premises known as the marital residence at 71 Highland Avenue in Bridgewater Township, New Jersey. An appraisal of the market value of said premises shall be made by George Sopko, of 58 North Bridge Street, Somerville,

designated by the Court to make such appraisal. The cost of said appraisal shall be borne equally by the plainriff and defendant. Within sixty days of August 19, 1980, the defendant shall purchase the plaintiff's interest in said premises, which interest shall be established as one half of the said appraised value, deducting therefrom the balance on the mortgage. Simultaneously with the payment of the said one half of the equity to the plaintiff, she shall execute a deed prepared by the defendant for her signature, conveying all of her interest in said property to the said defendant. The condition of this conveyance, however, shall be the continued occupation of the said by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being

the basis on which this arrangement and custody have been made between plaintiff and defendant.

5. The plaintiff shall have the right to occupy the premises, together with the defendant and the infant children, for a period of ninety days from August 19, 1980, at which time she shall remove herself from said premises.

6. The plaintiff shall be the owner of the following items of furniture and/or furnishings in the marital home, or wherever they are located, having been removed from the said home:

Luggage
China
Kitchen utensils
Antique ice box
Clock
Rocker
Three pictures
Two lamps
Two black vases
Bed room set
High rise bed
Floor cushions
Stereo speakers
Her sewing machine, clothing, & hook rugs

Boy's wooden blocks and wooden puzzles

All other contents of the said residence shall be the property of the defendant, except that the seesaw which came from the plaintiff's family, shall be used by the children, but may not be sold, and shall be, when the children no longer use them, turned over to the plaintiff's sister, and shall not be the property of the defendant.

7. The defendant shall provide and there shall be nursery school available to Michael Mastropietro for an additional year and to Jeffrey Mastropietro for two years.

8. The defendant shall turn over to the plaintiff the plaintiff's father's antique gun, which shall be the property of the plaintiff.

9. Approximately $800 have been removed by the defendant from the children's bank accounts. The said sums in the

denomination in which they were removed shall be the property of the said children, to be given to them at the time of their majority. The said deposits shall be made forthwith.

10. Plaintiff and defendant shall each be responsible for the debts which they will incur from August 19, 1980, on. The defendant shall be responsible and shall pay all household debts which have been incurred by plaintiff and defendant singly or jointly, up to and including August 19, 1980 and he shall hold the plaintiff harmless from any responsibility for the payment of said debts.

11. The plaintiff and defendant shall each continue to be the owner of the automobile presently in their name and in their respective possession.

12. By way of distribution, the defendant shall pay the plaintiff the sum of

$2,200, which represents one-half of two bank accounts and shall pay to plaintiff the sum of $493.70 representing one-half of the 1979 I.R.S. tax rebate check.

The parties having referred to the Court the determination of counsel fees for their attorneys and repayment of a loan from defendant's parents, it is hereby ORDERED:

13. There is due and owing to defendant's parents the sum of $8,300 loaned to the plaintiff and the defendant on the purchase of the marital home. There shall be deducted from the top of the equities for the marital home above set forth, the said sum of $8,300, in addition to the mortgage, before distribution is made of said equity.

14. Defendant shall pay to Sachar, Berstein, Rothberg, Sikora & Mongello, Esqs., attorneys for the plaintiff, on account of their counsel fee, the sum of

$1,000.

MICHAEL R. IMBRIANI
J.S.C.

I, W.Lewis Bambrick, Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Final Judgment now on the files of my office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Trenton, this 17th day of September, Nineteen hundred and eighty

545

This Deed, made the 14th day of January 1981, between Maxine L. Mastropietro, single, c/o CMDNJ (Adolescent Unit), University Heights, Hoes Lane, in the Township of Piscataway in the County of Middlesex and State of New Jersey herein designated as the grantors; and Robert A. Mastropietro, single, residing or located at #71 Highland Avenue, in the Township of Bridgewater in the County of Somerset and the State of New Jersey herein

designated as the Grantees;

Witnesseth, that the Grantors, for and in consideration of six thousand two hundred and twenty-two dollars and 81/100 ($6,222.81) lawful money of the United States of America, to the Grantors in hand well and truly paid by the Grantees, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledge, and the Grantors being therewith fully satisfied, do by these presents grant, bargain, sell and convey unto the Grantees forever, all that tract or parcel of land and premises, situate, lying and being in the Township of Bridgewater in the County of Somerset and the State of New Jersey, more particularly described herein. (NJS46:15-2.1)Municipality of Bridgewater Township Block No. 4508, Lot No. 27 and 28, beginning at a point for a corner formed by the intersection of the

northerly side line of Highland Avenue and the easterly side line of Maple Avenue; thence (1) along the easterly side line of Maple Avenue running north 1 degree 46 minutes east 200.67 feet to a corner; thence (2) running north 87 degrees 5 minutes east 114.96 feet to a corner; thence (3) running South 2 degrees 55 minutes east 200.00 feet to a corner on the aforementioned northerly side line of Highland Avenue; thence (4) along the northerly side line of Highland Avenue running South 87 degrees 05 minutes west 131.34 feet to the point and place of BEGINNING.

THE ABOVE described premises being lots #27 and #28 in Block G as shown on a map entitled "Map of First Section of Green Knoll Park, Somerville, Bridgewater Township, Somerset County, N.J., April 1, 1910" which map was filed in the Somerset County Clerk's Office on June 8, 1910 as

Map #104-A

BEING commonly known and designated as 71 Highland Avenue, Bridgewater, New Jersey.

BEING the same premises conveyed to ROBERT A.MASTROPIETRO AND MAXINE L. MASTROPIETRO, his wife, by deed from JOHN S. VASTA AND CONCETTA J. VASTA his wife, dated March 10th, 1977, and recorded on March 17th, 1977 in the Office of the Clerk of Somerset County, in Book 1348, page 43.

The Grantor and Grantee herein were divorce by Dual Final Judgment of Divorce entered in the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. M-8660-79, dated September 11th, 1980.

A provision of the Dual Fianl Judgment of Divorce, specifically paragraph 4 therein, sets forth a condition of the within conveyance as follows:

"4...The condition of the conveyance,

however, shall be the continued occupation of said by defendant and the infant children solely, or with the defendant's wife should he remarry, until the last child graduates from high school..." Together with all and singular the buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; And also all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, of the Grantors both in law and in equity, of, in and to the premises herein described, and every part and parcel thereof, with the appurtances. To have and to hold all and singular, the premises herein described, together with the appurtenances, unto the grantees and to Grantees' proper use and benefit

forever.

And the Grantors covenant that they have not done or executed, or knowingly suffered to be done or executed, any act, deed or thing whatsoever whereby or by means whereof the premises conveyed herein, or any part thereof, now are or at any time hereafter, will or may be charged or encumbered in any manner or way whatsoever.

In all references herein to any parties, persons, entitles or corporations, the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require. wherever in this instrument any party shall be designated or referred to by name or general reference, such designation is intended to and shall have the same effect as if the words "heirs,

executors, administrators, personal or legal representatives, successors and assigns" had been inserted after each and every such designation.

In Witness Thereof, the Grantors have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the presence of
Francis T. Gleason, Jr. Maxine L. Mastropietro
Jan 14, 3:24 pm 1981
Somerset County
L.R.Olson, Clerk

State of New Jersey, County of Somerset: be it remembered that on January 14th, 1981, before me, the subscriber, personally appeared Maxine L. Mastropietro, single, who I am satisfied is the person named in and who executed the within Instrument, and thereupon she acknowledged that she signed, sealed and delivered the same as her act and deed, for the uses and purposes therein expressed, and that the full and actual consideration paid or to be paid for the transfer of title to realty evidenced by the within deed, as such consideration is defined in P.L. 1969,c.49,Sec.1(c), is $6,222.81.

Francis T. Gleason, Jr
An attorney at law of
New Jersey

prepared by:
Leroy P. Lusardi, Esq.

BOOK 1434page519 END OF DOCUMENT

CERTIFICATION OF DEFENDANT

I, ROBERT ALAN MASTROPIETRO, do hereby certify the following:

1. I am the defendant in the within cause of action and I am familiar with the facts stated herein.

2. On September 11th, 1980 a Dual Fianl Judgment of Divorce was entered in this matter, a copy of which is annexed hereto and marked Scedule A.

3. I make this application to the Court for an Order to amend said Dual Judgment of Divorce, specifically paragraph 4 dealing with a sale restriction and paragraph 2 dealing with visitaion.

4. Pursuant to the Judgment of Divorce I was awarded custody of the three sons of the marriage, Brian, Michael and Jeffrey. My sons continue to reside with

me. Since the entry thereof I have remarried, having married Oksana Jasinousky on April 2nd, 1982. We now have one son born of the marriage, being Kevin, who was born on June 10th, 1983, and is now 2 years of age.

5. Our present home consists of a 3 bedroom house having about 1,000 square feet of living area, and with my present family of a wife and 4 sons the house is just not large enough for us. The children are now aged 10, 9, 7, and 2 and they require more adequate sleeping arrangements than presently exist. We now have two children occupying bunk beds in a room that is only 12.4 x 8.5 feet. I would like to sell the property at 71 Highland Avenue, Bridgewater, New Jersey, and purchase a larger home for the family. In view of the high cost of housing in Bridgewater, I would request that I be permitted to purchase property

within a 25 mile radius of Bridgewater so that my former wide will not be unreasonably inconvenienced in visiting the children, and ask that this Court modify the Dual Judgment of Final Divorce to remove the restriction against the sale of the Highland Avenue property and permitting me to purchase larger accomodations as indicated above. I am willing to have a similar restriction against sale placed against the property which I do purchase, if necessary.

6. In April of 1985 I discussed this matter with the plaintiff and initially she agreed to such a revision in regard to a move within Bridgewater. My attorney prepared the appropriate documents which I submitted to plaintiff for her signature on or about May 23rd, 1985. Those documents consisted of an Order to Amend Dual Final Judgment of Divorce and proposed Quit Claim Deed. They are

annexed hereto as Scedules B and C.

7. The plaintiff thereupon indicated that she had changed her mind and refused to sign the documents. She never objected to the form of the document.

8. I would also ask that the visitation priveleges as contained in paragraph 2 of the Dual Judgment of Final Divorce be revised, wherein my former wife was granted "unlimited" visitation with the children. That may have been a reasonable provision at the time that the divorce was granted in view of the tender ages of the children of the marriage at such time. Now that the boys are older, this unlimited visitation is becoming a hardship on both the boys and me. My former wife has been taking the children three and four nights during the week and two out of three weekends. This conflicts not only the personal lives and schoolwork of the children, but with

other family activities which we may have planned. The only nights she does not take the children is when they have soccer or little league baseball. Therefore I find myself with almost no free time to spend with them doing our family activities or father-son type activities, such as fishing and sports. The boys presently exist almost "out of suitcase" which is very difficult for them and for me. I find it much more difficult to schedule any activities with my boys, since I constantly feel that any resistance would create conflict, and I don't feel that is a good situation psychologically for the children. I have had numerous discussions with the plaintiff aobut the visitation but she has refused to agree to any form of limitation on the visitation. I would ask that the Court place a limitation on visitation to every other weekend and one

weeknight per week.

9. It should also be pointed out that the plaintiff has not been abiding by the 48 hour notice requirement of the present Order and her apparent interpretation of unlimited visitation means that she can visit when she pleases without notice. It is totally unworkable. The plaintiff insists upon keeping the boys overnight on school nights, which interferes with their homework assignments and necessary adjustments to prepare for school days. For instance, on Wednesday, June 12th, 1985, the plaintiff insisted upon picking up the boys for Wednesday and Thursday overnight and to take them out of school on Friday, June 14th, 1985 to go to Great Adventure. She had given 48 hours notice of this visitation but I tried to talk her out of the overnight and the length of the visitation. She refused to listen. On Friday, June 14th, she called to say

that she wasn't bringing the boys back that night, although she had originally promised that she would. I discussed with her the fact that the boys participated in an early Saturday, June 15th, 1985 am soccer match. Her answer was "you pick them up at 6:30 in the morning and take them to soccer, as you please."

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: June 19th, 1985.
ROBERT ALAN MASTROPIETRO, DEFENDANT

END OF DOCUMENT
lil

MAXINE L. MASTROPIETRO
30 Fairmount Avenue
Bridgewater, NJ08807
(201)722-4792
Plaintiff

SUPERIOR COURT
CHANCERY DIV
FAMILY PART
SOMERSET COUNTY

Plaintiff,
MAXINE L. MASTROPIETRO

DOCKET NO
M-8660-79

vs

Defendant,
ROBERT A. MASTROPIETRO

CIVIL ACTION

CERTIFICATION OF PLAINTIFF IN OPPOSITION TO MOTION TO MODIFY FINAL JUDGMENT OF DIVORCE

I, Maxine L. Mastropietro do hereby certify the following in opposition to defendant's motion to modify Dual Fianl Judgment of Divorce:

(1) I am the plaintiff in the above entitled matter and make this certification in response to defendant's motion returnable July 12, 1985.

(2) The parties entered into a property settlement agreement dated Sept 11, 1980 which became part of Dual Final Judgment of Divorce as attached to Certification of Defendant (Schedule A)

(3) I was a hardfought agreement. Issues concerning house and visistation schedule were essential elements of entire

agreement. In fact, it was so essential that the provision concerning limit of sale of house was recorded on the deed; the only reasons I gave up custody. Because of defendant's attitude at time of divorce I felt these provisions would be the Only way I could secure what was best for our children. Both natural parents would have input into the upbringing of the children.

(4) It is my understanding that law requires a substantial change in circumstances to amend or change an agreement that was entered into by consent. In my opinion he has not demonstated a substantial change of circumstances that could not have been contemplated at time we entered into agreement. In fact, the agreement refers to circumstances of his remarriage.

(5) I resided at said residence four years and to the best of my knowledge

circumstances of living arrangements are not unreasonable or uncomfortable. I regularly visit with my children and they have never complained about living arrangements. If defendant feels circumstances are so unbearable in my opinion he should look into expanding present residence instead of immediately coming to court to change original agreement.

(6) If he moves outside of Bridgewater it would not be in best interests of children because it would change their school, change their friends, and be further away from me. Over last year children have finally settled in school, like friends, and are involved in extracurricular activities through school system. A change would mean starting all over again and they have had enough upheaval in their lives.

(7) As an example, in November, 1983,

Brian had been having significant difficulty to warrant an evaluation by the Child Study Team. At present, June, 1985, he has fianlly tested out of Basic Skills Program.

(8) Since date of divorce I have worked two, sometimes three jobs to buy a house close to my children. It is interesting that I have finally achieved five-year goal of house near children and that he has been living under these alleged unbearable conditions for two years and chooses to make this application within a few months of achieving goal.

(9) Defendant distorts problems with visitation. He attempts to give impression that he does all transporting for visitation and extracurricular activites. This is absolutely untrue. I do entire driving for visitation and when children have activities I transport for activities.

(10) Present distance is three miles between houses. I pick up and return children which is twelve miles. In addition, I take them to their activities which may be as far away as seven miles and return to my residence and later pick them up again and return to my residence. As an example one weekend (Fri 2:40p-Sat, 7:30p) resulted in 97 miles of traveling for children. If he were allowed to move this traveling distance would increase dramatically.

(11) In regard to defendant's application to limit visitation, the provision of property settlement agreement providing for unlimited visitation was the essential consideration for allowing him to have custody. That his allegations that it creates problems are untrue. That I am always flexible if defendant plans activities with children.

(12) His application for specific visitation is unacceptable and unworkable for me because of my employment requiring I work every third weekend. Most importantly the flexibility of present situation meets the children's needs and allows them maximum contact with both parents. If defendant truly desires to spend more time with the children I am more than willing to discuss with him ways to accomplish that. If the court believes nothing else in this certification, it is essential the court believe I have only the children's best interests in mind.

(13) Based upon above I respectfully request the court deny the defendant's application in its entirity. If the court feels there is some merit to defendant's application, that I respectfully request a hearing on all issues.

MAXINE L. MASTROPIETRO, PLAINTIFF

I certify that the original of the within Certification of Plaintiff in Opposition to Defendant's Motion to Modify Dual Final Judgment of Divorce has been forwarded to the Clerk of the Superior Court at Trenton for filing; a copy has been forwarded to the Clerk of Somerset County at Somerville for filing; and a copy has been forwarded to the attorney for defendant, Leroy F. Lusardi by certified mail.

DATED: July 5, 1985

MAXINE L.MASTROPIETRO

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. M-8660-79

MAXINE L. MASTROPIETRO,
plaintiff

v.

ROBERT A. MASTROPIETRO,
defendant

Stenographic Transcript of Motion

Place: Somerset County Courthouse
Somerville, NJ 08876

Date: July 12, 1985

B E F O R E
THE HONORABLE MICHAEL R. IMBRIANI, JSC

TRANSCRIPT ORDERED BY: Maxine L. Mastropietro

A P P E A R A N C E S:

Maxine L. Mastropietro, Pro se

more about that move, or can I get into the history?

THE COURT: Let's get into this. Not too much history.

M. MASTROPIETRO: I don't want to get into too much history either because it's pretty sickening to me.

THE COURT: Why do you object to any move at this time even across the street? Why should I require them to stay in this house and put an addition on, which is very expensive this day and age, and not be able to move anywhere?

M.MASTROPIETRO: It's substantially less expensive tham moving, period. It could cost him $5,000 to raise a roof and

put three bedrooms and a bath, maintain the same neighborhood--

THE COURT: $5,000?

M. MASTROPIETRO: A neighborhood we agree on to raise our children in. Okay? We both agreed that we liked that neighborhood to raise our children in.

If you now allow him to move, to choose a neighborhood where they can further slander me, where none of the parents

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THE COURT: Three miles one way?

M. MASTRPIETRO: And I just moved to decrease the mileage from seven to that.

THE COURT: I mean suppose, for instance, they wanted to move to Thomae Park, which is the other side of Bound Brook, which is about two--it's close to where you now live. Would you object?

M.MASTROPIETRO: Yes. You are not maintaining a neighborhood--we both

agreed on this neighborhood for the quality of the neighbors, the friendliness of it.

My children get more nurturing from that neighborhood than they do from the defendant, and you're allowing he can now move and he can choose a neighborhood where they can further damage the children and their self esteem.

THE COURT: What proof is there that they'd be damaged by a move? I don't see--there is nothing to tell me--

M.MASTROPIETRO: You don't think that--

THE COURT: I mean moving today is a

normal thing . Tens of thousands of children move. They don't become damaged over that.

M.MASTROPIETRO: No, they don't become damaged from moving from one building to another, but this building secures a lot more than that. It has secured their

friends, which are most important to the children.

The children don't want to move. They want to maintain those friends. Two of the three children want to maintain their friends in that neighborhood.

The children don't care that the defendant moves, as long as they can stay in the neighborhood.

Are they really wanting to move, after six months ago thay went to such an extent to prevent me from moving there? If they wanted to move, why didn't let me move there and then move out?

THE COURT: I don't think they had that much to say six months ago, very candidly.

Suppose he got another job, what would happen?

M.MASTROPIETRO: What do you mean another job? Requiring he move out of state?

THE COURT: A job down in Atlantic City.

M.MASTROPIETRO: That's just it. That agreement is a specific agreement. It did not leave it to general law precedent that he could move within the state. It was a specific agreement that he remain at that said residence. It's an agreement that says on the deed--that further states that was the sole basis for the entire agreement, and it's a specific one. It's not leaving it up to--it didn't say he could move within Bridgewater. It didn't say he could move within the State. It said he was to stay at that residence, and you are allowing a change in this agreement at this point and it is going to snowball into an entire deterioration.

I put up with harrassment over visitation, clothing, medication--

THE COURT: That has nothing to do with

whether he lives here or any where else. Those problems are going to exist.

Is there any detriment to you if he were permitted to move? Forget the children at this point. If he were permitted to move into

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M.MASTROPIETRO: It would be a lot better than moving further than three miles.

THE COURT: Well, I just asked you about Thomae Park. That's closer to your home.

M.MASTROPIETRO: I would prefer a move closer than a move further away, but it doesn't secure what this agreement already secures, their friends in that neighborhood and the type of neighborhood that they are living in and a neighborhood that is secure that they can't slander me in.

THE COURT: I don't think that has

anything to do with--

M.MASTROPIETRO: Until the people move out of it, and the people heve lived there a long time.

THE COURT: Anything more you want to add, ma'am.

M.MASTROPIETRO: Yes.

THE COURT: Go ahead

M.MASTROPIETRO: I want to add that you are changing one-sided a consent agreement in favor of the defendant, and five years ago that was a hard-fought agreement. Okay? I was under extreme duress of providing everything for the children a year prior to the divorce. The defendant deserted. He had plans to desert after the divorce, to take a job in Europe. I did not have a salary to provide for my children. It left me with a job of living on welfare or working two jobs, which would not have left me time to see my children at all, and on top of

that, I had difficulty with billing over an attorney not knowing where money was being spent there. I had difficulty--I came into Court paying thousands of dollars that would take me months to earn where I had to sit in Court all day and not be heard!

At that time I secured all I could for the children. Same parents, regular frequent contact with both parents, same friends, same house, same neighborhood, same schools, the same standard of living, and that is what that physical building is securing.

I sacrificed my primary life goal of being mother, the daily nurturing of my children, and I have lost that for five years of my life, and they've lost on that because they had to adjust to the drastic life style of parenting between defendant and

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in the wings, and you don't sign the deed.

M.MASTROPIETRO: Look, I am the one that doesn't spend money because I want to spend it on my children. I am not going to pay moneys for attorneys. How many thousands of dollars, how many days of overtime--I'll have to work 50 days of overtime for an appeal.

THE COURT: Mrs. Mastropietro, are you telling me now that you will accept the decision that I've just rendered and then when a new house is found by Mr. Mastropietro that you will sign the deed to sell the old property as long as you see in the new deed a statement similar to this deed?

M.MASTROPIETRO: The order is he has to move within three miles of my present residence?

THE COURT: Yes

MR.LUSARDI: Judge, I prepared the deed

because she had agreed once before in April--

M.MASTROPIETRO: I did not agree. He lied about that.

MR.LUSARDI: And she didn't sign then.

THE COURT: I am going to trust her.

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END OF DOCUMENT

FILED
Jul 15 2:06 pm'85
SOMERSET COUNTY
L.R.OLSON CLERK

LEROY P.LUSARDI,ESQ
265 East Main St
Somerville, NJ 08876
(201)725-8200
Attorney for Defendant

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERSET COUNT

Plaintiff,
MAXINE L.MASTROPIETRO
V
Defendant,
ROBERT A.MASTROPIETRO

DOCKET NO
M-8660-79

CIVIL ACTION

ORDER AMENDING
DUAL FINAL
JUDGMENT OF

DIVORCE

This matter being opened to the Court by Leroy P. Lusardi, Esq, attorney for defendant, on application for a Order to amend the Dual Final Judgment of Divorce in this matter, and the Court having considered the moving papers and being of the opinion that this Order should be made,

IT IS, on this 15th day of July 1985,

ORDERED that the Dual Fianl Judgment of Divorce entered in this matter on September 11th, 1980, be and the same is hereby amended as follows:

(1) Paragraph 2 thereof shall be amended so that the plaintiff shall have the right of visitation with the infant children born of the marriage on alternate weekends between the hours of 5:00 PM on Friday and 6:00 PM on Sunday, and on one night during the week between

the hours of 5:00 PM and 10:00 PM, upon giving the defendant express 48 hour notice of her intentions. Plaintiff shall also have the right of visitation on alternate holidays. The parties shall alternate Thanksgiving, New Year's Day, Easter, Memorial Day, 4th of July and Labor Day. The children's birthdays and Christmas shall be shared by both parents. Each year the parents shall alternate Christmas Eve and Christmas morning with Christmas afternoon including Christmas dinner. Plaintiff shall also be entitled to two weeks of summer vacation with all of the children simultaneously, provided she gives 30 days notice thereof to defendant.

(2) Paragraph 4 shall be amended by deleting therefrom the restriction against defendant's removal from the marital premises until the last child graduates from high school. The plaintiff

shall execute a Quit Claim Deed relinquishing said restriction as recorded in deed book 1434 at page 518, Somerset County Clerk's Office ~~within 30 days from the date hereof~~ AT THE TIME of closing. Until the last child shall graduate from high school the defendant shall not reside outside the radius of ~~25~~ 3 miles ~~of~~ from THE PLAINTIFF'S home IN Bridgewater Township, Somerset County, New Jersey.

MICHAEL R.IMBRIANI JSC

END OF DOCUMENT

MAXINE L. MASTROPIETRO
30 Fairmount Avenue
Bridgewater,NJ08807
(201)722-4792
Plaintiff

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERST CTY

Plaintiff,
MAXINE L.MASTROPIETRO
vs
Defendant,
ROBERT A.MASTROPIETRO

DOCKET NO
M-8660-79

CIVIL ACTION

CERTIFICATION
OF PLAINTIFF
IN OPPOSITION

TO DEFENDANT'S
MOTION TO
RECONSIDER
COURT ORDER OF
JULY 15TH,1985

I, MAXINE L.MASTROPIETRO, do hereby certify the following in opposition to defendant's notice of motion to reconsider court order of July 15, 1985:

1) I am the plaintiff in the above entitled matter and make this certification in response to defendant's motion returnable August 2, 1985.

2) I am shocked by this re-application. That I was served by these papers at 7pm Monday, July 22, 1985 and have been advised by the court clerk that the motion will be heard August 2, That based upon this application I have been forced to try and obtain legal counsel and am unable to do so on such short notice.

3) I did get an appointment with an

attorney who would not take the case but who advised me of the following legal ramifications of this motion:

a) that I must have two weeks notice for a motion

b) that this application would fall under rule 4:50-1, which specifies certain circumstances which would allow relief from an order.

4) In regards to paragraph 3b in my certification, the attorney I met with advised me that based upon all documents submitted in this motion, there is nothing which would allow the defendant to make this application based on rule 4:50-1. Such as the defendant filed his motion and I was served on June 20. I responded in a timely manner and that even if the defendant's attorney did not receive my response on time, he did not make any objection at the time of the hearing.

5) The reason defendant is requesting this re-consideration seems to be that I stated the present traveling distance was 2 1/2 miles and that Mr. Lusardi did not have the defendant in court to challenge that allegation. This is untrue. Paragraph 10 of my certification said present distance is three miles. If defendant wanted to contest this allegation there is no reason why he couldn't have supplied the court with the information set forth prior to July 12 or request an adjournment in order to supply the court with this "new information". It appears to me that the defendant simply did not like the court's decision and is now attempting to have the court re-consider the entire matter. The proper course would be for the defendant to appeal this court's decision.

6) In regards to papers filed on behalf of defendant for this motion, I

would like to point out that the defendant is a chemical engineer and is not qualified to accurately depict the distances in the school districts.

7) Defendant apparantly attempts to dispute my allegation as to the present distance from our residences by saying it is 4.1 miles rather than my allegation that it was approximately 3 miles; however, he admits that it is 3.4 miles "as the crow flies" and is apparantly trying to extend the limitation to 6 miles "as the crow flies". Obviously, the attached map does not take into consideration actual travel distance.

8) The defendant also attempts to mislead the court by stating that my only objection to his move would be the change of schools for the children. This is untrue. My certification dated July 5, 1985 sets forth numerous other reasons.

9) In an attempt to be reasonable I

did actually measure the driving distance between our present residences and found it to be 4.1 miles. As I stated to Judge Imbriani's law clerk, I have no objection to the order being modified to the extent that the defendant may move within a radius of 4.1 miles driving distance from the plaintiff's present home in Somerset County.

10) In the event the court decides to change the present order other than modifying to the extent of the 4.1 mile radius, I respectfully request that the court allow me sufficient time to obtain legal counsel in order that I may be properly represented. I have contacted five attorneys to represent me in this matter but have only been able to meet with one due to short notice and vacations.

11) In regards to the order signed on July 15, 1985. I received my copy on July

17 and telephone Judge Imbriani's law clerk to inquire as to why the order did not specify that any new residence's deed purchased by the defendant would contain the same restrictive covenant as contained in the present deed. He advised me that he recalled that this was part of Judge Imbriani's decision. Accordingly, I respectfully request that this specific language be included in the court's next order.

12) Based upon the defendant's actions and dissatisfaction with the court's prior order, I have had to spend $100.00 for consultation with an attorney. I respectfully request that the defendant be required to reimburse me for this expense.

MAXINE L.MASTROPIETRO,

PLAINTIFF

I certify that the original of the

within Certification of Plaintiff in Opposition to defendant's Notice of Motion to Reconsider Court Order of July 15, 1985 has been forwarded to the Clerk of the Superior Court at Trenton for filing; a copy has been given to the Clerk of Somerset County at Somerville for filing; and a copy has been forwarded to the attorney for the defendant, Leroy P. Lusardi by certified mail.

DATED: July 26, 1985

MAXINE L.MASTROPIETRO,
PLAINTIFF

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY FAMILY PART:
SOMERSET COUNTY DOCKET NO M-8660-79

MAXINE L. MASTROPIETRO
Plaintiff
v.
ROBERT A.MASTROPIETRO
Defendant

STENOGRAPHIC TRANSCRIPT OF EXCERPT OF PROCEEDINGS

PLACE:
Somerset County Court
Somerville, NJ

DATE:
August 2, 1985

BEFORE: THE HONORABLE MICHAEL R.IMBRIANI JSC

TRANSCRIPT ORDERED BY:
Maxine L. Mastropietro

A P P E A R A N C E S:

MAXINE L. MASTROPIETRO
Plaintiff Pro Se

LEROY P. LUSARDI, ESQ.
Attorney for the Defendant

CHARLES R. SENDERS, CSR
OFFICIAL COURT REPORTER
SOMERSET COUNTY COURTHOUSE
SOMERVILLE, NEW JERSEY 08876

THE COURT: Before we get into the criminal list, we have a motion carried over from July 12.

This is Mastropietro versus Mastropietro. This is a case involving a matrimonial dispute in which I entered an order on July 12.

It was somewhat unique in that the judgment of divorce provided that the Defendant-father, who had custody of the children, would not sell his home and would always reside in the same home.

He is now seeking permission, because he has remarried and has additional chid,

to sell the home, in contravention of the express terms and conditions in the judgment of divorce.

The reason, as he says, is that he needed additional space and the original family home is too small.

The wife objected because she felt it was important to her and the children that they remain in the neighborhood, which is why she insisted on that provision in the judgment.

What I did on July 12 was enter an order which provided that Mr. Mastropietro could sell the home. But that any new home that he purchased could not be further in distance from the home in which the Plaintiff-mother resided.

In other words, I felt that if it was necessary, in the opinion of Mr. Mastropietro to sell the home, that home, that I would permit him to do so. But I

don't think it is fair to have the children moved very far.

I didn't think it was fair for the plaintiff-mother, who has visitation, to have to travel a greater distance. It was represented to me at that hearing by Mrs. Mastropietro, as I recall, that she resided three miles from the present family home.

Therefore, my order provided that Mr. Mastropietro could sell the family home. But the new home that he purchased would have to be within a radius of three miles of the home that Mrs. Mastropietro now resides.

I now have a motion for reconsideration. One of the things pointed out in the affidavit, and I don't think there is any dispute, is that Mr. Mastropietro actually measured the distance from his home to Mrs.

Mastropietro's home, which he figured out by air miles he said is 3.4 miles. I don't know how he did that, but that's what he says. The shortest distance by car, according to Mr. Mastropietro, is 4.1 miles

He is now back asking for permission, I assume, to purchase a home that is more than three miles from the home of Mrs. Mastropietro. He is asking for permission to purchase a home within the radius which is much greater in mileage than I am now permitting, from Mrs. Mastropietro's home.

So, I have received the motion, I have reviewed it. I have examined the certification of Mr. Lusardi, his attorney, who submitted the motion. There is a certification by Mrs. Mastropietro in opposition.

Alright.

MR.LUSARDI: if it please the Court, at

the outset I'd like to thank the Court for giving us the time for you to hear the reconsideration of this motion at an early date, considering your Honor's vacation schedule.

With regard to the parents, the Defendant who I represent and the Plaintiff, their ideas about what should happen with the children.

page 5...16

END OF DOCUMENT

FILED
Aug 9 3:26 PM'85
SOMERSET COUNTY
L.R.OLSON CLERK

LEROY P.LUSARDI,ESQ
265 E. Main Street
Somerville, NJ08876
(201)725-8200

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERSET COUNTY

Plaintiff
MAXINE L.MASTROIETRO

vs

Defendant

DOCKET NO
M-8660-79

CIVIL ACTION

ROBERT A.MASTROPIETRO

ORDER

This matter being opened to the Court by Leroy P. Lusardi, Esquire, attorney for defendant,and Maxine L. Mastropietro, plainttiff, appearing pro se, on application to reconsider an Order entered on July 15th, 1985 and to grant further relief to amend the Dual Fianl Judgment of Divorce; and the Court having considered the certifications on behalf of the parties and the argument of counsel and plaintiff, pro se;

IT IS, on this 9th day of August, 1985,

ORDERED that the relief requested by defendant is denied, except that, to conform the July 15th, 1985 Order to corrective mileage information furnished by the certifications on behalf of the parties, it is ORDERED that paragraph 4

of the Dual Final Judgment of Divorce entered September 11th, 1980 shall be amended by deleting therefrom the restriction against defendant's sale and removal from the marital premises until the last child graduates from high school. The plaintiff shall execute a Quit Claim Deed releasing said restriction as recorded in deed book 1434, page 518, Somerset County Clerk's Office, at the time of closing. Until the last child shall graduate from high school, the defendant shall not reside outside a 3.4 mile radius (by air) or 4.1 mile road mileage from plaintiff's home in Bridgewater Township, Somerset County, New Jersey; and it is further

ORDERED that a similar restriction be placed upon the deed to be received by defendant, Robert Alan Mastropietro, in connection with the purchase of an alternate residence.

MICHAEL R.IMBRIANI JSC

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
Michael R. Imbriani, Judge
Somerset County Court House
P.O. Box 3000
Somerville, New Jersey 08876
(201)231-7075

September 6, 1985

LeRoy P. Lusardi, Esq.
265 East Main Street
Somerville, New Jersey 08876

re: Mastropietro v Mastropietro
Docket No. M-8660-79

Dear Mr. Lusardi:

I just returned from vacation and read Mrs. Mastropietro's letter to me of August 8, a copy of which was sent to you.

She makes reference to a hearing which was held on August 2 (which was my last

day at work before leaving on vacation). Apparantly you have submitted a proposed order under the five day rule, but very frankly, I have no recollection of receiving the order or signing it. Perhaps I had before I went on vacation, but I certainly cannot recall signing it.

In any event, please review this matter and advise me whether the order is signed and what your position is with respect to the argument of Mrs. Mastropietro as to what should be the content of the order.

Very truly yours,

MICHAEL R.IMBRIANI

jm

cc:Mrs. Maxine L. Mastropietro

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
Michael R. Imbriani, Judge
Somerset County Court House

P.O.Box 3000
Somerville, New Jersey 08876
(201)231-7075

September 17, 1985

Leroy P. Lusardi, Esq.
265 East Main Street
Somerville, New Jersey 08876

re: Mastropietro v. Mastropietro
Docket No. M-8669-79

Dear Mr. Lusardi:

This is to acknowledge receipt of your letter dated September 16 which was hand delivered to my Chambers yesterday.

I agree with you that since Mrs. Mastropietro has filed a Notice of Appeal that it would be improper for this Court to amend its prior order.

It is my understanding that an appeal removes the matter from the jurisdiction of the trial court and any changes and additions shoud be made by the Appellate Division.

Very truly yours,

MICHAEL R.IMBRIANI JSC

a60

jm
cc: Ms. Maxine L. Mastropietro

END OF DOCUMENT

CERTIFICATION OF PLAINTIFF

I, Maxine L. Mastropietro, do hereby certify the following:

1. I am the plaintiff in the within cause of action and I am familiar with the facts stated herein.

2. Following the defendant's Motion for Reconsideration returnable August 2, 1985, the defendant's attorney, Mr. Lusardi, submitted a proposed Order according to the "five day rule"; I received the proposed Order on August 7,1985 and submitted timely objections to the wording of this Order. I then received a copy of the proposed order signed by the Honorable Michael R. Imbriani as entered in the above matter on August 9, 1985, without reference to my objections.

3. On September 6, 1985, I filed a Notice of Appeal with the Appellate Division of the Superior Court. It is annexed hereto as Schedule A.

4. On September 9, 1985 I received a copy of a letter sent to Mr. Lusardi, the defendant's attorney, from the Honorable Michael R. Imbriani inquiring as to the status of the Order. He states that his last day of work prior to vacation was August 2, 1985 and further states that he just returned from vacation and read the letter of objections. This letter annexed hereto as Schedule B.

5. On September 9, 1985, the defendant, Robert Alan Mastropietro, had a Century 21, Colonial Hills, realty sign displayed at the 71 Highland Avenue residence and apparantly has entered into a contract with said realty. Innocent parties could incur detriment from this action.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willingly false, I am subject to punishment.

Maxine L. Mastropietro
plaintiff pro se

DATED: September 17, 1985

END OF DOCUMENT

DANIEL MARTIN. ESQ
356-12 Gemini Drive
S. Somerville,NJ 08876
(201)874-4871
Attorney for
Plaintiff-appellant

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIV

DOCKET NO
A-220-85T6

MAXINE L.MASTROIETRO
Plaintiff-appellant

vs

ROBERT A.MASTROPIETRO
Defendant-respondent

CIVIL ACTION :
On Appeal From
Final Judgment
the Superior
Court of New
Jersy Chancery
Div, Fmy Part,
Somerset Cty:
Amending Final
Judgment.

SAT BELOW : Hon Michael R. Imbriani JSC

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

On July 22, 1985, defendant filed a motion, returnable August 2,1985, seeking Reconsideration of the July 15, 1985 Order which forbade defendant from residing more than 3 miles from plaintiff's house until the last child graduated from high school. (Pa17-Pa18)

Oral argument was heard and an oral opinion delivered by Judge Imbriani on August 2, 1985. On August 6, 1985, Leroy P. Lusardi, Esq., attorney for defendant, submitted a proposed form of Order to Judge Imbriani. A copy was sent to plaintiff pursuant to the "5 day rule". R.4:42-1(b). (Pa19)

On August 8, 1985, plaintiff filed her objections to the proposed form of Order with Judge Imbriani, pursuant to R.4:42-1(b) (Pa20).

On August 9, 1985, an Order was signed by the Honorable Michael R. Imbriani, JSC, modifying the provisions of the July 15, 1985 Order. (Pa21-Pa22)

On September 6, 1985, plaintiff pro se filed a Notice of Appeal of the August 9, 1985 Order. (Pa23)

On September 6, 1985, Judge Imbriani wrote a letter to defendant's counsel. The Judge advised Mr. Lusardi that he did not recall signing the Order and that he had not read plaintiff's objections to the form of Order as required by R.4:42-1(b). The Judge asked Mr. Lusardi to respond to plaintiff's objections. (Pa24)

September 17, 1985, plaintiff filed a Notice of Motion, returnable October 4, 1985, seeking a clarification of the form of the August 9th Order in light of Judge Imbriani's letter, and a stay of the execution of that Order. (Pa25-Pa26)

Jersey. (Pa2-Pa3)

The preliminary Order signed by Judge Imbriani on July 15, 1985 (Pa15-Pa16) was signed contrary to the requirements of R.4:42-1. The form of the Order was not settled by Motion on notice to all parties, or upon consent of plaintiff under R.4:42-1(a); nor was a proposed form of Order submitted to plaintiff under the "5 day rule", R.4:42-1(b). (Pa33 at para 2)

On July 19, 1985, plaintiff called the Court to express her objections to the July 15th Order being signed contrary to R.4:42-1. She was told by Mr. O'Donnahue, Judge Imbriani's law clerk, not to be concerned with the form of that Order since a Motion for Reconsideration (Pa17, Pa18) had been filed by defendant and the July 15th Order, thus would not be the final order in the matter. (Pa33, para3)

The express condition of the agreement with respect to custody and to plaintiff's giving up her rights in the marital residence was that defendant would continue to reside in the marital residence until the youngest child graduated from high school. (pa3-23 and Pa4-1) The youngest child is currently 7 years old.

Plaintiff would not have agreed to defendant having custody of the children or to defendant retaining possession of the marital residence unless defendant agreed to continue to live there until the children were grown. (Pa35 at para 2, T12-4 to T17)*

On September 3, 1985, the marital residence was listed for sale by a multiple listing service. (Pa38)

...page 6

Quagliato v Bodner , 115 N.J. Super 133 (App Div 1971):

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*Transcript of July 12, 1985, to be known as T

> "...to obtain relief from an order under R.4:50-1(f), one must show that the enforcement of the order would be unjust, oppressive, or inequitable, Greenberg v Owens 31 NJ 402, 411 (1960) (Jacobs J. dissenting)"(Quagliato at 138); cf La Bell v Quasdorf , 116 NJL 368, 372 (Sup Ct 1936)

It has also been said that, "Relief may be granted under...subsection (f)...only where...there is also a showing of extreme hardship and the equities clearly run in favor of the party applying for relief from the judgment." Doyle v Chase Manhatten Bank 80 NJ Super 105, 125 (App Div 1963).

Defendant's application fell far short of establishing grounds for relief under either of these standards.

The one and only reason put forth by defendant to seek relief under R.4:50-1(f), is found at para 5 of defendant's Certification in Support of his Motion:

> "5. Our present home consists of a 3 bedroom house having about 1000 square feet of living area, and with my present family of a wife and 4 sons the house is just not large enough for us"(Pa111)

At oral argument on the Motion, defendant's counsel put forth no other justification for relief from the judgment besides the size of the house.

Thus, the question before the trial court was: would it be unjust, oppressive, or inequitable to enforce paragraph 4 of the divorce judgment, requiring defendant to remain in the marital home until the youngest child finishes high school (the youngest child

...page 9

to have been concerned with the best interests of defendant rather than those of the children:

> "I would also say, one of the reasons Mr. Mastropietro wants to move is because, as he indicates that the house

> is too small now for his needs and that Bridgewater is an area in which houses are very expensive.."(T4-21 to 25)

There is no doubt, however, that if defendant had made an adequate showing that the children would actually be harmed by enforcement of the judgment, as for example, if the house had been condemned as unfit for continued habitation due to unsanitary conditions, relief under R.4:50-1 would be appropriate.

However, no such showing was made, nor could it be made in light of the simple fact raised by plaintiff in her Cert fication in Opposition (Pa40, para 5), and her Certification attached to the Reply Brief (Pa33, para 4), that defendant could simply add on to the house at no greater cost to him than the costs of selling his current house and

buying a new house. (Brackett Construction Co. estimates, Pa42-45).

This solution would secure a larger living area for the children, while, at the same time, enforcing a judgment which should be enforced under the standards set forth by Quagliato v Bodner and Doyle v Chase Manhatten Bank , supra.

In Pogue v Pogue , 147 NJ Super 61, 64 (Ch 1977), the Court quoted the New York State Court of Appeals, with respect to a request for intervention in the best interests of the children:

> "'The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law . The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral mental, and physical conditions

are so bad as seriously to affect the health or morals of the children should the courts be called upon to act . (2 N.E. 2d 661)'" (emphasis supplied)

The decision as to whether these children should live in the current residence, perhaps with additional space added on to it, or in a different residence, is not one which is appropriately made by the court. There is no evidence that moral, mental, or physical conditions seriously affecting the health or morals of the children would result from enforcing the voluntary agreement of the parties, entered into 5 years ago, providing that the children should continue to reside in the current residence.

Moreover, even if the question of where these children would be better off living is appropriate for judicial intervention, it was not adequately established that a move to another

residence would, in fact, serve the children's best interests.

In her Certification in Opposition (Pa40, para 6 & 7), at oral argument (T10-10 to 19, et. seq.), and again in her Certification in Support of Motion for Stay (Pa35, para 3), plaintiff explains her reasons why she feels that the proposed move would not serve the best interests of her children. Her principal reason is that the proposed move would disrupt the children's lives,

...page 12

alternative of adding on to the marital residence is available, the best interests of the children cannot serve as the basis for court intervention to set aside the agreement.

If the best interests of the children was, in fact, the basis for the trial

courts decision to amend the divorce judgment, then at the very least, the decision that the children's best interests would be served by a move should not have been made without affording plaintiff the opportunity to present evidence concerning those interests at a plenary hearing. This point will be developed at length in Point IV, infra.

Defendant will presumably argue in his brief in response, that regardless of how the Appellate Court might view the case, a motion under R.4:50-1 is addressed to the sound discretion of the trial court, guided by equitable principles, and the trial court's decision will be upheld in the absence of an abuse of discretion (cf Hodgson v Applegate 31 NJ 29, 37 (1959), Shammas v Shammas 9 NJ 321, 328 (1952), La bell v Quasdorf 116 NJL 368, 372 (Sup Ct 1936)).

However, as the La_bell Court pointed out:

> "This discretionary authority is legal and not_arbitrary in character; it must be exercised in_consonance_with established_principles_of_law ...JUDICIAL discretion , to borrow the words of Lord Mansfield, means 'sound discretion guided by law', and not by whim or humor."(La Bell at 372, emphasis supplied citations omitted)

Thus, in determining whether the trial court abused its discretion

The Supreme Court has even recognized that great weight should be given to spousal agreements as_to_support , despite the fact that support agreements (unlike equitable distribution agreements) may be routinely modified by the court on a simple showing of changed circumstances (Ganther_v_Ganther , supra; cf Lepis_v_Lepis 83 NJ 139 (1980)):

> "We have recognized and emphasized repeatedly that matrimonial agreements between spouses relating to alimony and support, which are fair and just, fall within the category of contracts enforceable in equity. Carlsen v Carlsen . 72 NJ 363, 370-371 (1977); Berkowitz v Berkowitz 55 NJ 564, 569 (1970); Schlemm v Schlemm 31 NJ 557, 581-582 (1960). Such agreements are essentially consensual and voluntary in character and therefore entitled to considerable weight with respect to their validity and enforceability not withstanding the fact that such an agreement has been incorporated in a judgment of divorce. Carlsen v Carlsen supra at 371." (Peterson v Peterson 85 NJ 638, 642 (1981))

The Peterson Court goes on to say at 642:

> "Accordingly we approach the spousal agreement in this case with a predisposition in favor of its validity and enforceability."

The trial court quite clearly violated this principle of predisposition in favor of the validity and enforceability of a

marital agreement. There can be no doubt from an examination of the record that the court did not approach the provision in paragraph 4 of the divorce judgment, the very "...basis on which this arrangement and custody have been made between plaintiff and defendant" (Pa4), with a predisposition in favor of its validity:

page 15

> "THE COURT: What proof is there that they'd be damaged by a move? I don't see... there is nothing to tell me..." (T10-20 to 22)

Quite obviously the Court has shifted the burden to plaintiff to prove that setting aside the judgment and permitting the move would be harmful. At no point in the proceedings did the court even ask defendant to prove harm to himself or to the children from enforcement of his obligations under the agreement and the judgment.

In shifting the burden to plaintiff and requiring her to prove why a 5 year old agreement *should* be enforced, the trial court exercised its discretion "arbitrarily and not in consonance with established principles of law" (*La Bell* supra).

(3) The third important principle of law which governed the trial court was the standards discussed above, for the review of applications under Rule 4:50. Defendant was required to show that enforcement of the judgment should be unjust, oppressive, or inequitable (*Quagliato v Bodner* supra), or alternately, that enforcement would work a great hardship on him *and* that the equities clearly run in his favor (*Doyle v Chase Manhatten Bank* supra).

It is hard to imagine how defendant could argue that the equities clearly run in his favor in this case. He voluntarily

entered into an agreement, reaped substantial benefits from that agreement, including custody of his children and possession of the marital residence, and then went to court 5 years later asking for relief from his primary obligation under the agreement. It was clearly foreseeable to him at the time he enterd into the agreement,

that at some time in the future, he might want a larger place to live. He was 28 years old when he entered into the agreement, and remarriage and the further expansion of his family was certainly foreseeable. In agreeing to remain in the marital residence until the children graduate from high school, defendant was implicitly agreeing that if he needed more room for his family he would have only one option, to add on to his existing residence. He gave up his other

obvious option to move to a larger residence. And in no way was that an unfair, or an unconscionable agreement. It was entered into voluntarily and substantial benefit was derived in exchange for his promise not to move. It is in now way unjust or inequitable to hold defendant to the obligation of his bargain after he has already received the benefits of that bargain.

Defendant still has the perfectly reasonable option of adding on to his house. In fact, considering the costs of selling defendant's house (%6 broker's commission on a $150,000 home=$9,000 (Pa51)) and the additional expenses of buying another house (home & termite inspections, survey, title search & ins., mortgage application fees, loan origination & discount & appraisal fees, credit reports, and attorney fees), the cost of adding on to defendant's present

home (estimates of Brackett Construction Co. for an add on to a similar home at Pa42-Pa45) would probably be no greater than the costs of moving.

And even if the expense of adding on were considerably greater, this still would not constitute undue hardship. That is the price defendant paid for entering into a voluntary agreement with plaintiff.

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It seems apparant that the trial court treated the property settlement agreement before it, not as one which was entered into and incorporated into a divorce judgment 5 years ago, but rather as if it were before the court for the first time. In setting aside paragraph 4 of the agreement, Judge Imbriani completely ignored the standards for review of a Rule 4:50 Motion, and simply decided that he didn't like the agreement and wouldn't

enforce it. This manner of review was addressed and rejected in Gulick v Gulick 113 NJ Super 366, 369 (CH 1971)(quoted with approval in Barrie v Barrie 154 NJ Super 301, 307-308 (App Div 1977), certif. denied 75 NJ 601 (1978)):

> "Where the parties agree after arms-length negotiation and the court's approval by incorporation into a judgment appears, I think it can be fairly presumed that the totality of facts was available. To permit a court to be asked on the application of either one of the litigants at some later time to re-examine the facts which they and the court have already considered, toward the end of adding a supervening judgment to the parties' own considered determination, seems to me to be wrong in several respects. First, it fosters a sort of second-bite-from-the-apple philosophy. Either party may consciously accept a voluntary determination of support with the confidence that if things do not work out right, he can start all over again. Second, it imposes upon a trial judge the obligation of making a determination as to support, not in a relatively

> uncluttered arena of a first presentation of the facts, but rather, influenced, subconsciously or otherwise, by the support considerations which the parties voluntarily assumed after full fact finding, as it were. Third, it encourages something less than the best judgment in the litigants, at the important moment of the divorce, to bring to bear all those factors which might be the subject of proper consideration with regard to the matter of support. Finally, as noted in Martindell , it inflicts on the courts and the parties a heavy and unnecessary burden of belated reexamination"

The trial court abused its discretion by setting aside a judgment under R.4:50-1 in the absence of a requisite showing that the enforcement would have been unjust, oppressive, or inequitable to defendant. The lower court Order should therefore be reversed.

POINT II

DEFENANT'S MOTION FOR RELIEF FROM THE JUDGMENT WAS NOT MADE WITHIN A REASONABLE

TIME UNDER R.4:50-1(f) AND 4:50-2, NOR DID IT COMPLY WITH THE OTHER PROCEDURAL REQUIREMENTS OF RULE 4:50 MOTIONS, AND THE TRIAL COURT SHOULD THEREFORE NOT HAVE CONSIDERED THE MOTION.

R.4:50-2 requires that all applications to set aside judgment be made "...within a reasonable time,.."

In Palko v Palko 73 NJ 395 (1977), the court was faced with an application to set aside a property settlement agreement incorporated into a divorce judgment. In considering the timeliness of the application, the court said at 398:

> "A significant element in the timeliness of plaintiff's motion, noting the strictures of the rule, would consist of the date when plaintiff first discovered the facts underlying her application..."

In this case, the fact underlying the application was that defendant had another child and that room would have to be made for the child. Defendant first discovered this fact in about October,

1982, when the child was conceived (the child was born in June, 1983 (Pa11 at

page 19

para 4)). Yet, he waited 33 months, until June 1985, to make an application for relief.

The reason for the requirement of R.4:50-2, that an application to set aside a judgment must be made within a reasonable time, is of course the principle discussed above, that "...litigation must eventually be ended, and that at some point the prevailing party be allowed to rely confidently on the inviolability of his judgment." (Hodgson v Applegate supra at 43)

It seems clear that it was not reasonable for defendant to have waited 33 months to come to court to seek relief from the judgment. His motion should not have been considered.

Defendant also failed to follow the

other procedural requirement of R.4:50. The Rule states that an application will be considered "on motion with briefs...", yet, no brief was submitted by defendant in support of his motion, only a certification (Pa9-Pa14).

The reason why the requirements of R.4:50 were not followed is that defendant did not make his application under this rule. His application was actually made under Rule 1:6 (Pa9), the Rule governing ordinary motions for relief by the Chancery Division, Family Part. This may in part explain the obvious substantive and procedural deficiencies of defendant's case under R.4:50 (see Point 1 supra). However, it does not excuse those deficiensies.

In Ganther v Ganther supra, the Appellate Division reversed a trial court's Order modifying a term of a property settlement agreement. One reason

for the Ganther Court's decision was that plaintiff had not made a proper motion under R.4:50: page 20

> "Since the time within which to appeal from the judgment of divorce has expired without an appeal having been taken, and since the judgment has not been sought to be reopened and set aside pursuant to R.4:50-1 , the property settlement agreement included in the judgment is binding and enforceable against both plaintiff and defendant, and the trial court lacked the power to modify it." (Ganther at 231, emphasis supplied)

This is precisely the situation in this case. Neither the substantive, nor the procedural requirements of R.4:50 were met and defendant's application to set aside the judgment should not even have been considered by the court.

POINT III

IN ORDERING PLAINTIFF TO EXECUTE A QUIT CLAIM DEED RELEASING DEFENDANT FROM THE CONDITION OF THE CURRENT DEED REQUIRING HIM TO REMAIN IN THE MARITAL RESIDENCE UNTIL THE CHILDREN GRADUATE FROM HIGH

SCHOOL, WITHOUT AFFORDING PLAINTIFF THE RIGHT TO A FULL TRIAL ON ALL ISSUES CONCERNING HER INTEREST IN THE PROPERTY, THE TRIAL COURT DEPRIVED PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED HER THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE XIVTH AMENDMENT TO THE U.S. CONSTITUTION.

On January 14, 1981, some 5 months after the parties were divorced, plaintiff executed a deed to the marital residence at 71 Highland Avenue, Bridgewater, New Jersey. (Pa7) This deed transferred plaintiff's interest in said property to defendant. However, the deed contained a specific condition which retained for plaintiff a reversionary interest in the property:

> "...the condition of the conveyance, however, shall be the continued occupation of the said premises by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school..."

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decision taking away her property right

was made on a motion based upon certifications. She had no opportunity to present evidence disputing defendant's claims or to subpoena or cross-examine witnesses.

Such a summary decision denied to plaintiff the process due her and also, in treating her differently from others defending their property rights, with no rational basis for doing so, denied to her the equal protection of the laws.

POINT IV

IN LIGHT OF THE DISPUTED FACTUAL ISSUES BEFORE THE COURT, AND THE FACT THAT THE AMENDED PORTION OF THE PROPERTY SETTLEMENT AGREEMENT WAS CENTRAL TO THE ENTIRE AGREEMENT, THIS CASE SHOULD, AT THE VERY LEAST, BE REMANDED TO THE TRIAL COURT FOR A PLENARY HEARING ON ALL ISSUES.

The condition of defendant's continued occupancy in the marital residence until the youngest child graduates from high

school was the "... basis on which this arrangement and custody..." (Divorce Judgment Pa4)(emphasis supplied) was made between plaintiff and defendant. In amending this provision of the agreement the trial court has changed a key portion of an agreement voluntarily entered into between the parties. Unless this court reverses the decision of the trial court, as it should, plaintiff will have lost the most important thing she bargained for in giving up her right to occupy the marital residence, and in giving up her claim to custody of her children. She would not have made the agreement if she knew that defendant would be permitted to move from the home.

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FILED APPELLATE DIV Jan 8 1986

LETTER BRIEF IN REPLY TO
DEFENDANT'S BRIEF IN RESPONSE

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
State House Annex
Trenton, New Jersey 08625

FILED
APPELLATE
DIVISION
Feb 19 1986

Re:Mastropietro v Mastropietro
Docket No. A-220-85T6

Civil Action : On Appeal from an Order Amending Dual Final Judgment of Divorce by Chancery Div, Family Part, Somerset County

Sat Below : Hon Michael R. Imbriani, JSC without a jury

Your Honors: This letter brief is submitted in lieu of formal brief on appeal in the above captioned matter in accordance with Rule 2:6-2(b)

page 7

the preliminary Order of July 15th by recalculating the mileage restriction therein. In fact, as discussed supra at footnote (1), plaintiff agreed to the

proposed mileage modification prior to oral argument on Defendant's Motion for Reconsideration. (Pra2,para 9)

It should be made absolutely clear that the trial court's modification of the 5_year_old_Dual_Final_Judgment_of Divorce , which is the subject of this appeal, can not in any way be justified by the trial court's authority to grant relief where an error in an earlier determination is ascertained. There was clearly no error in that determination, nor has defendant put forth any other ground under R.4:50-1 to justify the modification of paragraph 4 of the divorce judgment (see Pb at 5-18).

POINT_III

IT IS ABSOLUTELY CLEAR FROM THE RECORD THAT THE ENTRY OF THE ORDER OF AUGUST 9, 1985 VIOLATED THE REQUIREMENTS OF RULE 4:42-1.

In Point III of his brief in response defendant argues that the entry of the August 9, 1985 Order was proper under the Rules of the Court. An examination of the record reveals otherwise.

The sequence of events surrounding the entry of the August 9, 1985 Order was set forth in plaintiff's brief (Pb2)

On August 2, 1985 an oral decision was rendered by Judge Imbriani.

On August 6, 1985 a proposed form of Order was submitted by defendant's attorney. A copy was sent to plaintiff pursuant to the "5 day rule", R.4:42-1(b).(Pa19)

On August 8, 1985 plaintiff filed her timely objections to the proposed form of Order. (Pa20)

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-220-85T6

MAXINE L. MASTROPIETRO, Plaintiff-Appellant, v ROBERT A. MASTROPIETRO, Defendant-Respondent.	ORIGINAL FILED APR 30 1986 ELIZABETH MCLAUGHLIN CLERK

Submitted April 16, 1986-Decided APR 30 1986 Before Judges Fritz and Baime.

On appeal from Superior Court of New Jersey, Chancery Div, Fmy Part, Somerset County.

Daniel L. Martin, attorney for appellant

Leroy P. Lusardi, attorney for respondent

PER CURIAM

This is an appeal from an order of the Superior Court, Chancery Division, modifying a provision contained in a previously entered dual judgment of divorce which precluded defendant from moving out of the marital home until the youngest of the parties' three children graduated from high school. The trial

judge granted defendant's application permitting him to move to a new home within 4.1 miles of plaintiff's present residence. Although phrased in a variety of ways, plaintiff's principal contention is that the trial judge abused his discretion. We disagree and affirm.

The salient facts are not in dispute. The parties were divorce in September 1980 following seven years of marriage. Pursuant to the parties' agreement, defendant retained custody of the couple's three children. As part of the property settlement, defendant agreed to purchase plaintiff's share of the marital residence. However, plaintiff's conveyance of her interest to defendant was bottomed on the following condition which was set forth in the final judgment of divorce:

> The condition of this conveyance ...shall be the continued occupation of the said [home]

> by defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being the basis on which this arrangement and custody have been made between plaintiff and defendant.

This condition was also incorporated in the deed conveying plaintiff's interest in the marital residence to defendant.

In June 1985, defendant filed a motion seeking modification of the judgment of divorce to permit him to move to another address. In an accompanying certification, defendant represented that he had remarried in April 1982 and that a son had been born in June 1983. He stated that his present house had only three bedrooms and approximately 1000 square feet of living space. In view of these cramped conditions, defendant requested amendment of the divorce judgment to allow him to move to a larger house within 25 mile radius of Bridgewater.

Plaintiff opposed the motion. She contended that the provision in the property settlement which precluded defendant from moving out of the marital home until the children graduated from high school was an essential condition of her agreement to surrender custody. She claimed that the stability and friendliness of the neighborhood were significant factors contributing to her children's well being. She also cited what she perceived as a realistic danger that if defendant were permitted to move to another area he would "poison" the new neighborhood's attitude toward her.

Citing the crowded nature of defendant's present living conditions, the trial judge granted the motion to modify the judgment of divorce. However, he directed that defendant not move beyond three miles of plaintiff's address in order to facilitate continued frequent

visitation. The judge concluded that the children would not be harmed by changing neighborhoods and that the prospective move would benefit the family unit. Defendant subsequently moved for reconsideration and requested that he be permitted to move to a residence within 4.1 miles of plaintiff's home. Following argument, the trial judge granted defendant's motion. This appeal followed.

Our thorough review of the record convinces us that the trial judge did not abuse his discretionary powers granted under R.4:50-1(f). We note at the outset that application for modification of a

1. Plaintiff did not appeal from the original order. Her notice of appeal refers only to the order granting defendant's motion for reconsideration. As noted previously, however, her arguments on appeal pertain to the first order. We have, nevertheless, chosen to overlook this irregularity and decide the appeal on the merits.

property seelement agreement, incorporated into a final judgment of divorce, falls within the purview of that rule. See Palko v Palko , 73 N.J. 395, 398 (1977); Edgerton v Edgerton , 203 N.J. Super 160, 173 (App Div 1985); Ganther v Ganther 153 NJ Super 226, 230-231 (App Div 1977). Such a motion is addressed to the discretion of the trial judge. The discretion conferred by the rule "is a broad one to be exercised according to equitable principles..." Court Invest Co v Perillo 48 NJ 334, 341 (1966). The very essence of the rule is "its capacity for relief in exceptional situations." Ibid. Thus, "strict bounds never confine its scope." Hodgson v Applegate 31 NJ 29, 41 (1959). Its boundaries "are as expansive as the need to ahcieve equity and justice." Court Invest Co v Perillo supra 48 NJ at 341. See also Manning Engineering Inc v Hudson

Cty Park Comm 74 NJ 113, 122 (1977); Quagliato v Bodner 115 NJ Super 133, 138 (App Div 1971). The decision reached by the trial judge is to be sustained by an appellate court "in the absence of an abuse of its discretion." Court Invest Co v Perillo supra 48 NJ at 341.

While we recognize that relief from a judgment is permitted under R.4:50-1(f) "only when truly exceptional circumstances are present," Bauman v Marinaro 95 NJ 380, 395 (1984); Gulick v Gulick 113 NJ Super 366, 370 (Ch Div 1971), we cannot fairly say that the trial judge mistakenly exercised hes discretion in this case. Nor can we say that defendant's motion was not made within a reasonable time under R.4:50-2. While defendant may have anticipated earlier the problems that ultimately compelled him to seek relief from the divorce judgment, this delay was not

prejudicial to plaintiff and was understandable in light of the gradually increasing need for living space as the children grew older.

We also reject plaintiff's contention that she was entitled to a plenary hearing. An evidentiary hearing is not warranted in every case. We conclude from the record that there was no genuine issue of material fact. We, thus, find that the trial judge did not abuse his discretion in denying an evidentiary hearing. Barrie v Barrie 154 NJ Super 301, 307 (App Div 1977), certif den 75 NJ 601 (1978).

In the final analysis, "[i]t is not surprising...that this litigation will end on the same disappointing note as the marriage." Perkins v Perkins 159 NJ Super 243, 248 (App Div 1978). Nevertheless, we are convinced that the trial judge did the best he could within

the context of the competing arguments advanced. We cannot say that he was wrong.

Accordingly, the order of the Chancery Division modifying the judgment of divorce is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
Elizabeth McLaughlin
Clerk

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RECEIVED
May 29 1986
SUPREME COURT
OF NEW JERSEY

May 29, 1986

The Honorable Chief Justice and Associate Justices Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: Mastropietro v Mastropietro
Docket No 220-85T6

LETTER IN LIEU OF FORMAL PETITION FOR CERTIFICATION

off remaining in the current residence. (Pa35 para 3; Pa40 para 5-7; T*7-13 to 17; T10-10 to 15)

On September 3, 1985 the marital residence was listed for sale (Pa38). As of the date these papers are filed it has not been sold.

QUESTIONS PRESENTED

1. Did the trial judge abuse his discretion by ordering the amendment of a 5 year old Judgment of Divorce in the absence of any evidence that the enforcement of the judgment would be unjust, oppressive, or inequitable to defendant?

2. Should defendant's motion for relief from the judgment have been dismissed for failure to comply with the requirement of R.4:50-2, that such

motions be made within a "reasonable time"?

3. Is plaintiff entitled to a plenary hearing to resolve disputed factual issues which are at the heart of this matter?

4. By ordering plaintiff to execute a quit claim deed relinquishing her reversionary interest in the marital property, without affording her the right to a full trial of all issues concerning her interest in that property, did the trial court violate the Due Process and Equal Protection Clauses of the XIVth Amendment?

5. Did the trial court violate plaintiff's basic Constitutional right to raise her children, by overruling the parenting decision made by plaintiff (and agreed to by defendant in 1980) that the children's interests would be best served by remaining in the marital residence

through high school?

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6. Given the fact that the entire property settlement agreement was based upon the provision of paragraph 4 of the judgment of divorce requiring defendant to remain in the marital residence, if that provision is deleted, is the agreement void and is plaintiff now entitled to a plenary hearing to litigate all issues previously covered by the agreement?

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MAXINE L. MASTROPIETRO Plaintiff-Petitioner v ROBERT A. MASTROPIETRO Defendant-Respondent	SUPREME COURT OF NEW JERSEY C-1086 SEPTEMBER TERM 1985 25,691

ON PETITION FOR CERTIFICATION
FILED SUPREME COURT JUN 30 1986 CLERK

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-220-85T6 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS. the Honorable Robert N Wilentz, Chief Justice, at Trenton, this 27th day of June, 1986

Stephen Townsend
CLERK OF THE SUPREME COURT

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